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No.

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD E. BORDENKIRCHER, Superintendent Kentucky State Penitentiary - - Petitioner

versus

GEORGE H. CLEAVER - - - - - Respondent

Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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The petitioner prays that a writ of certiorari issue to review the appellate opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered October 31, 1980.

THE QUESTION PRESENTED FOR REVIEW

Is There a Constitutional Right to the Effective Assistance of Appellate Counsel, as Opposed to Trial Counsel?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are set forth in the caption of the case before this Court.

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No.

SUPREME COURT OF THE UNITED STATES

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DONALD E. BORDENKIRCHER, Superintendent
Kentucky State Penitentiary - - *Petitioner*

v.

GEORGE H. CLEAVER - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER, WITH APPENDIX

REFERENCE TO OPINIONS

Decision herein by the United States Court of Appeals for the Sixth Circuit was by opinion rendered and entered on October 31, 1980 in Cleaver v. Bordenkircher, —— F. 2d —— (6th Cir. 1980, No. 79-3514). This opinion may be found at Appendix 25-30. The order and memorandum opinion of the United States District Court for the Eastern District of Kentucky, reviewed on appeal to the Court of Appeals, were both dated May 29, 1979. The memorandum opinion was entered May 30, 1979, and the order was entered May 31, 1979, and both may be found at Appendix 31, 32-40.

STATEMENT OF JURISDICTION

The filing and entry date of the appellate opinion and judgment of the United States Court of Appeals for the Sixth Circuit of which review is sought in this Court is October 31, 1980. The appellate opinion and judgment resulted from a civil appeal from a habeas corpus proceeding in the District Court.

No rehearing was sought by any party.

Jurisdiction is conferred upon this Court to review by writ of certiorari the appellate opinion and judgment in question by 28 U.S.C. § 1254(1).

This Court should grant the writ of certiorari under the authority of Rules 17.1(a) and (c) of this Court.

Rule 17.1(a). The Sixth Circuit has decided a federal question in a way in conflict with the Supreme Court of Kentucky, a court of last resort, thereby casting doubt on the Kentucky court's Constitutional ability to dismiss Kentucky appeals based upon appellate counsel's procedural default. In so doing, the federal court of appeals has so departed from this Court's opinion authority regarding state-court appeals, and from its rule authority, and from its principles of comity and federalism as to call for this Court's supervision to resolve and restore its Constitutional authority.

Rule 17.1(c). The Sixth Circuit has decided a nationally important question involving state-court power over state-court appeals procedures, and as to whether there is a substantive Constitutional right to effective assistance of state-court appellate counsel, in a way in

direct conflict with *McKane* v. *Durston,* 153 U. S. 684 (1894), *Ross* v. *Moffitt,* 417 U. S. 600 (1974), and *Francis* v. *Henderson,* 425 U. S. 536 (1976), and the principles embodied in Rules 16.1 and 33.7 of this Court and Rule 31(c) of the Circuit Courts. That federal court of appeals cites no authority to justify its holding. This Court should settle such challenge to its authority and to the Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner asserts that there is no Constitutional authority to justify the result of the courts below. Such absence of authority involves reference to

The Sixth Amendment, Constitution of the United States

The Tenth Amendment, Constitution of the United States

The Fourteenth Amendment, Constitution of the United States

Rules 16.1 and 33.7, Supreme Court of the United States

Rule 31(c), Federal Rules af Appellate Procedure.

The full text of this authority is set forth at Appendix 42-45.

STATEMENT OF THE CASE

Reference herein will be to the record appendix on file in the Sixth Circuit (JA), and to the Appendix required to accompany this petition (A). Jurisdiction in the District Court was asserted under 28 U.S.C. § 2254 (JA 1; A 33).

Respondent George Herman Cleaver was found guilty in the Johnson (Ky.) Circuit Court of murder and robbery (JA 67). Judgment of conviction and sentence was imposed upon respondent in that court on February 5, 1976 (JA 67). Notice of Appeal to the Supreme Court of Kentucky was timely filed on February 5, 1976 (JA 20, 67).

The record on appeal was due no later than 120 days after February 5, 1976. However, respondent obtained three extensions of time so that the record was ultimately filed almost one year later on January 19, 1977 (JA 21). Respondent's appeal brief became due 40 days after January 19, 1977 (JA 22). Respondent moved for an extension of time in which to file his brief on the grounds that he had six briefs due in the period just before February 24, 1977 (JA 26). The Commonwealth of Kentucky did not object to respondent's motion and the Supreme Court of Kentucky granted the requested extension to March 30, 1977 (JA 29).

On March 30, 1977, respondent moved for an additional period of time in which to file his brief on the ground that he again had seven briefs due within ten days of March 30, 1977 (JA 30). On April 20, 1977, the Supreme Court of Kentucky denied the motion (JA 33).

On July 29, 1977, or three months after the brief was originally due, respondent moved for an extension of time to file his brief in which he recounted that he was unable to meet the March 30 deadline because he had seven other briefs to prepare, that he had since

prepared 23 subsequent briefs and that these facts constituted excusable neglect (JA 34-38).

The Commonwealth of Kentucky objected and moved to dismiss the appeal; the appeal was dismissed (JA 52, 54).

Respondent then returned to the Kentucky circuit court, which imposed another judgment upon him for the sole purpose of taking another appeal. On January 30, 1978, the Commonwealth of Kentucky moved to dismiss this second appeal (JA 75). The Supreme Court of Kentucky initially denied this motion (JA 89). However, that court on its own later reconsidered this denial and dismissed this second appeal (JA 90-95) in a case styled *Cleaver* v. *Commonwealth,* Ky., 569 S. W. 2d 166 (1978).

On October 13, 1978, respondent filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Kentucky in which he alleged he was denied the right of state-court appeal because of the ineffective assistance of his appellate counsel, in violation of the Fourteenth Amendment (JA 1-16).

Petitioner denied that respondent has a Constitutional right to the effective assistance of appellate counsel, as opposed to trial counsel, and that in the absence of invidious discrimination the dismissal of his Kentucky appeal did not violate the Fourteenth Amendment (JA 97-124).

On January 26, 1979, the District Court's magistrate, in his report and recommendation, agreed with respondent's argument (JA 125-127). Petitioner ob-

jected (JA 128-132). On May 29, 1979, the District Court issued a memorandum opinion finding against petitioner on the issues of (1) whether respondent had a Constitutional right to effective assistance of appellate counsel on state-court appeal, the District Court thinking such state appeal was "mandatory," and (2) if such right exists, whether it was violated by the failure of respondent's appointed counsel to timely file his brief on appeal, thereby causing dismissal of the appeal (A 31-40).

The District Court found on due process grounds that respondent had received ineffective assistance of his appellate counsel, and granted the writ of habeas corpus. That court pointedly noted that respondent had asserted no equal protection deprivation whatsoever in that court, and that he did not allege that the rules of dismissal were applied in a discriminatory way to deprive him of an appeal because of his indigency.

In reaching its due process decision, the District Court relied upon opinion authority of the United States Court of Appeals for the Sixth Circuit. However, the District Court did so with apparent reluctance on the basis of this Court's opinion in *Ross* v. *Moffitt,* 417 U. S. 600 (1974). The court noted that all the Sixth Circuit authority was decided before *Moffitt,* and that the law after *Moffitt* has without doubt become unsettled.

The District Court also criticized appellate counsel who continue to represent their client in subsequent

proceedings and assert their own ineffectiveness as the sole basis of relief (A 31-40).

Petitioner appealed to the Sixth Circuit. His appeal asserted that there is no right in the Constitution of the United States to the effective assistance of state-court appellate counsel, that assertion being discussed in six separate sections. The appeal asserted, among other things, that the right of appeal is not a Constitutional right but is created solely by state law.

The Sixth Circuit rendered its opinion on October 31, 1980, in an equal protection setting based upon facts not found in the District Court, and without an evidentiary hearing. That court concluded that respondent's appellate counsel was so overworked that he couldn't process the appeal. The Sixth Circuit determined that respondent has been deprived of the right to appeal his (state) conviction solely because his indigency status made the overworked public defender his only source of legal representation. Petitioner in District Court and before the Sixth Circuit had denied any invidious discrimination against respondent.

That Sixth Circuit concluded its opinion, affirming the District Court's result, by stating:

> In the District Court in our present case, the District Judge relied primarily upon a due process analysis based upon denial of counsel. In the event the largely equal protection rationale employed above is found inadequate to sustain this writ, alternatively we endorse the opinion authored by the District Judge * * *.

Thereafter, the Sixth Circuit stayed the issuance of its mandate, by order, pending petitioner's request for writ of certiorari in this Court.

ARGUMENT AND REASONS FOR GRANTING THE WRIT OF CERTIORARI

There Is No Constitutional Right to the Effective Assistance of *Appellate* Counsel, as Opposed to the Assistance of *Trial* Counsel.

The Constitutional question which this Court should accept and resolve is whether there is a right of effective assistance of state-court *appellate* counsel, as there is to *trial* counsel, under either due process or equal protection standards. If so, then this Court should decide whether such right will absolutely preclude state appellate courts from dismissing appeals based upon appellate counsel's procedural default. After all, what default by appellate counsel is worse than that which results in dismissal of the entire appeal?

The United States District Court below determined that there is a substantive due process Constitutional right to effective assistance of appellate counsel which precludes dismissal of state appeals. The United States Court of Appeals then used due process as an alternative basis to justify its equal protection case-by-case *factual* analysis to override the dismissal of the state appeal.[1]

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[1]It appears, *infra* at p. 20, that the United States Court of Appeals for the Sixth Circuit, by indirection, is asking this Court to review its opinion.

These federal courts reached this result knowing that federal courts themselves may dismiss appeals within their own jurisdiction under Rules 16.1 and 33.7 of this Court and Rule 31(c) of the Federal Rules of Appellate Procedure, under the same and similar factual circumstances, without violating the Constitution.

These questions are critically important to the Constitutional functioning of Kentucky's appellate courts and appellate procedures. In Kentucky, dismissal of appeals based upon failure to follow procedural rules is approved by the Commonwealth's Constitution, by procedural rule, and by decision of the Supreme Court of Kentucky. Numerous cases of this nature presently are being litigated in Kentucky courts and in federal habeas corpus courts on review. They apply to the circumstances which occur after the trial ends following felony conviction and after jurisdiction leaves the trial court and attaches in the appellate court.

The question then becomes, that while trial is Constitutionally fundamental, is state-court appeal also Constitutionally fundamental?

Unlike the Constitutional due process right to the assistance of trial counsel which arises from a specific Constitutional provision, the right of an indigent to appellate counsel arises, to the extent it may exist at all, from equal protection considerations of the Fourteenth Amendment.

If respondent has the right to effective assistance of appellate counsel, it must be a right wholly created by substantive due process. This Court has never so held, however, and its opinions on the matter indicate

that it will not so hold. The common practice, as seen in rules of dismissal in the federal system as well as among the states, indicates that such fundamental right does not exist.

To create such a right for the first time, moreover, would have severe adverse effects. State appellate courts could not exert effective control over the orderly processing of appeals, and finality of judgment would be destroyed. The federal judiciary, especially the district courts, would be forced to direct the administration of state appellate courts.

Under the authority of *McKane* v. *Durston,* 153 U. S. 684, at 687-688 (1894), state-court appeal is not a due process requirement of the Constitution:

> A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review.
>
> * * *
>
> It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper. * * * [W]hether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself.

Thus, Constitutional protection of life, liberty and property occurs only at trial, is extinguished at trial,

and Kentucky need have no appeal procedure whatsoever, as a matter of federal Constitutional law, the matter of appeal apparently having been reserved by the states unto themselves, Tenth Amendment, United States Constitution.

Through §§ 115-116 of its Constitution, Kentucky has created a system of limited and conditional appeal. That is, appeal may be taken only by following certain authorized rules of procedure. If those rules are not followed by all who would appeal, the appeal may be dismissed. The promulgation and enforcement of such procedural rules prevents chaos on appeal, enhances orderly and effective proceedings, and in fact provides all citizens with the equal protection of law. *Williams* v. *Payne,* Ky., 515 S. W. 2d 618, 619 (1974).

That appeal in Kentucky is not absolute is confirmed by (Ky.) CR 76.34(6), which provides that appeals may be dismissed in their entirety, and by *Cleaver* v. *Commonwealth,* Ky., 569 S. W. 2d 166 (1978), which approved dismissal of respondent's direct appeal from a murder conviction.

It is clear then, that Kentucky has created a conditional and limited system of appeal as approved by *McKane, supra.*

However, both the Sixth Circuit and the District Court erroneously concluded that in Kentucky appeal is absolute. Based upon that erroneous analysis of Kentucky law, both courts then proceeded to erect thereon an error of federal Constitutional law.

In so doing they did not address the reality, that if dismissal of appeals by federal courts based upon ap-

pellate counsel's procedural default is Constitutional, then so also must it be for state courts. It would be odd indeed for federal courts to impose Constitutional limitations upon state courts which they do not impose upon themselves. *Ross* v. *Moffitt,* 417 U. S. 600, at 617-618 (1974).

These federal rules buttress petitioner's argument. The violation of these rules which leads to their operation may be occasioned by the acts or omissions of appellate counsel. If violation of these rules automatically points to ineffective assistance by appellate counsel, or deprivation of appellate counsel, on Constitutional grounds, this Court could not countenance their existence and their enforcement would be worse than useless.

These federal rules are a practical application in federal jurisdiction of the logic expressed in *McKane, supra,* and in *Moffitt, supra* and *infra,* that there is no Constitutional due process right to a state criminal appeal or any of its parts. Since criminal appeals in federal law were unknown prior to 1889, *Carroll* v. *United States,* 354 U. S. 394, 400-401, n. 9 (1957), it is seen that no substantive or fundamental due process right to appeal arises from the Constitution. Logically and historically, therefore, there can be no Sixth Amendment right to effective assistance of *appellate* counsel. The Constitutional right to effective assistance of *trial* counsel is derived from the Sixth Amendment, *Beasley* v. *United States,* 491 F. 2d 687 (6th Cir., 1974), which is made applicable to the states through the Due Process Clause of the Fourteenth

Amendment, *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). The Sixth Amendment applies only to *trial* counsel and does not apply to *appellate* counsel.

Appeals and appellate counsel were unknown to federal law when the Sixth Amendment was adopted, and they remained unknown for another one hundred years, *Carroll, supra.* Appeal, it therefore is seen, is not a fundamental and independent Constitutional right to protect life, liberty or property. Such protection occurs at trial, and the failure of appellate counsel to timely file a brief on appeal does not offend the Sixth Amendment. Whatever happens in appellate court is not governed by due process standards which apply at trial. Those fundamental trial standards simply cease to exist when appeal commences, *McKane, supra,* and *Moffitt, supra* and *infra.*

Thus, the *McKane* law that appeals may be limited and conditioned upon procedural rules prevails in United States law in just the same manner as it prevails in Kentucky law. That is, counsel's acts or omissions on appeal simply do not offend the Constitution as a matter of due process, *Moffitt, supra* and *infra,* and respondent is without any federal remedy as regards his state-court appellate default. Of course, any allegation of violation of a Constitutional right at state *trial* could be vindicated by resort to habeas corpus in federal court. Interestingly, respondent in all the time he has spent in federal courts has *never* alleged in federal court that his state *trial* resulted in denial of a Constitutional right.

That being the case, petitioner submits that there can be no Constitutional right to effective assistance of *appellate* counsel on appeal, at least as such assistance applies to trial counsel in the fundamental arena of the trial court. After all, what default by appellate counsel can be worse than that default which leads to dismissal of the entire appeal? *McKane, supra.*

The reason there is no Constitutional right to state appeal or to prohibition of dismissal of appeal, or to effective assistance of appellate counsel, is articulated in *Moffitt, supra,* at 610-611, as follows.

Trial is fundamental. Appeal is not fundamental. A state trial court may not dispense with trial without the consent of the criminal defendant. A state appellate court, however, may dispense with appeal without the appellant's consent. Appeal, therefore, is no part of trial. Trial and appeal are significantly different and accomplish different things.

Accordingly, at some point the trial must end and the appeal, if any, begin. So do the duties of trial counsel end and the different aspects of appellate counsel representation begin. Kentucky law marking this point of change, *Hoy* v. *Newburg Homes, Inc.*, Ky., 325 S. W. 2d 301, 302 (1959) is binding upon federal courts, because any grant or privilege of state appeal is not a matter of fundamental due process under the Constitution.

The creation of appeal for criminal defendants, as well as the conditions of its taking, is entirely dependent upon the wisdom of state law, *McKane, supra.* That is, whether any appeal exists in any form at all

in Kentucky is entirely a Kentucky consideration and states may attach such conditions and limitations to appeal as they alone see fit, without offending due process. *McKane, supra.* Since the assistance of appellate counsel is ancillary to the non-fundamental grant of state appeal ,assistance of appellate counsel can rise to no greater due process status than the appeal itself.

Sections 115-116 of the Kentucky Constitution and the rules promulgated thereunder are entirely consistent with due process requirements. Respondent under the United States Constitution not being entitled to an appeal at all in Kentucky, except for the Kentucky Constitutional procedure granting one under conditions and limits, thus has no federal entitlement beyond what §§ 115-116 provide.

Therefore, dismissal of a state-court appeal does not offend the Constitution on due process grounds. Conceptually, for a person in respondent's present position, the right of appeal simply does not exist as a matter of state law. Thus a right of state appeal does not exist as a matter of Constitutional law.

And equal protection considerations, which must be made on a case-by-case factual basis, cannot elevate an appellant to an exalted position so that he may disregard state procedural requirements which all who would appeal must follow, as will be seen, *infra.*

Moffitt, supra, is important in another regard. It represents the first apparent attempt by this Court to come to grips with a generation of imprecise and ambiguous opinions which it has written in the area of

state-court appeal. Those opinions begin with *Griffin* v. *Illinois,* 351 U. S. 12 (1956), and *Douglas* v. *California,* 372 U. S. 353 (1963).

This *Griffin-Douglas* line of opinions, without ever identifying and explaining the Constitutional source of the asserted appeal right, tends to raise for the first time the idea that there may be a Fourteenth Amendment due process right under the Constitution to effective assistance of counsel on state-court appeal, and that it somehow may be buttressed by equal protection.

Moffitt, at 608-609, takes particular notice of this imprecise analysis and unidentified source of the asserted Constitutional right to state-court appeal, as expressed in this Court's *Griffin-Douglas* line of opinions:

> The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment. *Neither Clause by itself provides an entirely satisfactory basis for the result reached,* each depending on a different inquiry which emphasizes different factors . "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. (emphasis added).

Petitioner submits that the *Griffin-Douglas* line of cases does not stand for the proposition that there is a due process right to effective assistance of appellate couunsel, as opposed to trial counsel, on state-court appeal. To do so would be to overrule *McKane, supra,* and its continuing vitality is explicitly confirmed by *Moffitt, supra,* at p. 606.

Moffitt is the most direct examination made by this Court in the area of due process rights, if any, on state-court appeal, and clearly questions the Constitutional basis and reach of this Court's *Griffin-Douglas* line of statements on the matter. *Moffitt,* then, is seen as the first step taken by this Court to limiting the *Griffin-Douglas* sway, and adhering to the clear teaching of *McKane,* as regards state appeals procedures. Even the District Court below recognized that *Moffitt* is a turning point by this Court in this area, but nevertheless felt bound by the Sixth Circuit's pre-*Moffitt* decisions.

The Sixth Circuit, in upholding the *result* of the District Court below did so by a different method. Finding facts which had not been found or even inquired into by the District Court, the Sixth Circuit declared that dismissal of respondent's state-court appeal was an equal protection violation, and alternatively a due process violation.

Petitioner questions the accuracy of the Sixth Circuit's own fact-finding, and also questions the propriety of appellate fact-finding, especially in regard to a Constitutional question of this dimension, in the ab-

sence of any prior consideration or evidentiary hearing by the District Court.

Contrary to the assertion of the Sixth Circuit, it appears that the record does not show without dispute that respondent "was denied counsel to process his appeal, while other persons in Kentucky convicted of crimes who had the financial means to do so would have been able to perfect their appeals and receive adjudication of them" by Kentucky's highest court. Petitioner in the District Court (JA 98) asserted that respondent was not subjected to invidious discrimination, a point explicitly reiterated in his Sixth Circuit appeals brief at pages 20 and 48. The Sixth Circuit's equal protection rationale was squarely based upon respondent's indigency and what that court saw as his resulting discriminatory treatment on equal protection grounds. In this regard, it must be noted that the District Court explicitly determined that respondent in that court did not assert an equal protection deprivation as part of his habeas corpus claim, but only a due process deprivation. That being the case, how could petitioner deny an equal protection violation any more explicitly than he did.

It is the responsibility of one who claims a Constitutional deprivation in habeas corpus court to say what it is. That is the only way the custodian and court can answer and consider the charge. Instead of asserting that petitioner never disputed the deprivation found by the Sixth Circuit, the Sixth Circuit instead should have noted respondent's own non-as-

sertion in the District Court of an equal protection claim, and then refused to consider it.

The case of *Lucey* v. *Seabold*, No. 79-3752, was argued before the Sixth Circuit at the same time the present case was argued. The appellate counsel who defaulted there, leading to dismissal of the Kentucky appeal, was *retained*. As to this writing, no decision has been rendered by the Sixth Circuit in *Lucey*.[2]

Examination of the Sixth Circuit opinion will show that it makes no reliance for its result on authority of this Court, and that it does not identify the Constitutional source of the right it proclaims. It does, nevertheless, create a substantive Constitutional right to state-court appeal and absolutely overrides state-court appeal procedures. And it does so in the absence of proper claim in the District Court, in the absence of supportive fact-finding by the District Court, and in the face of the District Court's observation that *Moffitt* has left the last generation of this Court's pronouncements in the area of state appeal quite unsettled.

The Sixth Circuit concluded its opinion below with this remarkable assertion of its own Constitutional uncertainty about what it had just done:

> In the District Court in our present case, the District Judge relied primarily upon a *due process*

[2]The Sixth Circuit also asserts that the *Court of Appeals* of Kentucky denied respondent's motion for an extension of time and then dismissed his appeal. Of course, this was done instead by the Supreme Court of Kentucky. The Sixth Circuit also asserts that the Supreme Court of Kentucky dismissed the second attempt at appeal following a hearing. It appears that no evidentiary hearing was held, but an appellate oral argument.

> analysis based upon denial of counsel. In the event the largely *equal protection* rationale employed above is found inadequate to sustain this writ, alternatively we endorse the opinion authored by the District Judge * * *. (emphasis added) (A 30).

It is clear that the Sixth Circuit was uncertain about whether to justify its opinion upon due process or upon equal protection grounds. It also is clear that nowhere did that court identify and explain the source of the purported Constitutional right it proclaimed. It appears, in fact, that the Sixth Circuit may be asking this Court to resolve the matter. This is because only this Court has the power to find that an equal protection rationale is inadequate to sustain the writ of habeas corpus. Thus, it is to this Court that the Sixth Circuit's fear of reversal of its equal protection opinion had to be addressed.

The only assertable Constitutional requirement regarding appeal and appellate counsel, based upon equal protection considerations, is that the state treat everyone substantially the same as regards appeals.

Here, respondent nowhere alleged that he was singled out to arbitrarily cut off his appeal or that Kentucky's rules are other than neutral on their face. There has been no showing that Kentucky left the appeal door open for more affluent persons who did not follow its rules, nor do the facts of record so indicate.

Equal protection prohibits discrimination which is either invidious or without a rational basis, or discrimination that is based upon race, creed, color or similar

suspect classification. Equal protection means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. *Mallett* v. *North Carolina,* 181 U. S. 589, 598 (1901).

The Constitutional right to appellate counsel itself, to the extent it may exist, arises from the Equal Protection Clause of the Fourteenth Amendment, *Anders* v. *California,* 386 U. S. 738 (1967). The protection afforded to an appellant is strictly limited by the ambit of the equal protection clause, *Moffitt, supra.* Accordingly, unless the procedural default in failing to timely file the brief on appeal was occasioned by invidious discrimination against an appellant, the limited equal protection right of *Anders, supra,* is not violated. Further, unless the procedural default was occasioned by the creation by the state of an unfair advantage for itself, no right of *Moffitt, supra,* is violated.

There is no showing that the procedural default on direct state appeal was occasioned here by unfair advantage. Kentucky's system of appeal is rational and is neutral on its face and in its application. All persons are treated fairly and equally under Kentucky's system of appeal which, in the first place, is not itself a requirement of the Constitution. Any appeal would have been dismissed for anyone under the procedural default which occurred here. Violation of the Rules, whether by appointed or retained counsel, triggers dismissal.

In this regard, petitioner reiterates that this Court in *Moffitt, supra,* has taken the first step in dealing with the Constitutional haziness which may have led to the Sixth Circuit opinion, and which also tries to implicate fundamental due process standards for the first time.

The Sixth Circuit has violated this Court's authority in *McKane, supra,* and *Moffitt, supra,* as well as that which is embodied in Rules 16.1 and 33.7 of this Court and 31(c) of the Circuit Courts. Further, it has violated the principles of comity and federalism which this Court has so strongly announced in such opinions as *Francis* v. *Henderson,* 425 U. S. 536 (1976), and its respect for state procedures, as in *Wainwright* v. *Sykes,* 433 U. S. 72 (1977). This strong policy of federalism and respect applies even when proceedings in the fundamental *trial* arena are at issue.

In turning from the teachings of this Court, the Sixth Circuit has created untenable and unconstitutional problems for the appeals process in Kentucky and in the other states.

The question presented here is of plenary national importance, because it implicates state appellate procedures in the entire United States. That is, if Kentucky courts cannot dismiss appeals under state Constitutional authority, based upon acts or omissions of appellate counsel who thereby automatically and *per se*

render Constitutionally ineffective assistance, then neither can the courts of any other state.[3]

While this inability to dismiss appeals exists in the courts of Kentucky and of the other states, everyone involved will know absolutely that federal courts still allow themselves to dismiss appeals without offense to the Constitution, be it for reasons of appellate counsel's ineffectivenes or for other grounds. Everyone will understand the Orwellian observation, that while all court rules and procedures are equal, some court rules and procedures are more equal than others.

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[3]The Fourteenth Amendment protects liberty and property interests without apparent distinction. To say that a state court cannot dismiss a *criminal* appeal because of appellate counsel's procedural default is to say that state courts similarly cannot dismiss *civil* appeals based upon appellate counsel's procedural default.

CONCLUSION

Petitioner submits that this is a question of plenary national importance which should be accepted for resolution under the authority of this Court's Rules 17.1(a) and (c).

Respectfully submitted,

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Counsel for Petitioner

PROOF OF SERVICE

I, J. Gerald Henry, counsel of record for petitioner, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed by United States mail, with first class postage prepaid, to Mr. Jack Emory Farley and Mr. William M. Radigan, Office of Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40601, counsel for respondent, and that all parties required to be served have been served, all on this January 26, 1981.

J. GERALD HENRY
Assistant Attorney General
Counsel of Record for Petitioner

APPENDIX

No. 79-3514

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GEORGE H. CLEAVER,
Petitioner-Appellee,

v.

DONALD E. BORDENKIRCHER,
Superintendent, Kentucky State Penitentiary,
Respondent-Appellant.

APPEAL from the United States District Court for the Eastern District of Kentucky

Decided and Filed October 31, 1980
(Entered October 31, 1980)

Before: EDWARDS, Chief Judge, ENGEL and JONES, Circuit Judges

EDWARDS, Chief Judge. Respondent warden appeals from an order of the United States District Court for the Eastern District of Kentucky granting appellee Cleaver's petition for a writ of habeas corpus.

The facts show that Cleaver had been convicted in a Kentucky State Court on an indictment charging murder and robbery in the first degree. He was sentenced to life imprisonment. His counsel at trial was a court-appointed public defender who filed the appropriate notice of appeal in timely fashion.

After repeated extensions to allow for the filing of the record on appeal, the public defender was faced with a 40-day limitation on the filing of his appellate brief. Detailing

the work in other cases assigned to him which he had to accomplish during the time span involved, Cleaver's counsel sought a 30-day extension which the Supreme Court granted "as a final extension." At the end of that 30 days, and on the date when the appellate brief was required to be filed, the same counsel filed a motion requesting an additional 30-day extension, giving as reasons the following:

> During the next ten (10) days, the undersigned counsel has seven (7) appellate briefs which are scheduled to be filed with this Court and the Court of Appeals. In an attempt to complete as many of these pleadings as possible, the undersigned counsel has been forced to devote a majority of his available time to completing other cases to the detriment of appellant's appeal. The requested additional time is required to allow the undersigned counsel to devote the time to appellant's case which is necessarily required by its complexity and length.

The public defender's motion continued:

> Under *Anders* v. *California*, 386 U. S. 738, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493 (1967), appointed counsel's "role as advocate requires that he support his client's appeal to the best of his ability." Under our adversary system, it has become a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law. *High* v. *Rhay*, 519 F. 2d 109, 113 (9th Cir. 1975), citing *Anders* v. *California*, *supra*. Accordingly, when an appointed counsel in a criminal appeal because of his total volume of work is unable to devote sufficient time to complete a professionally competent appellate brief within the allotted time period, his only recourse is to seek an extension of time from

> the appellate court. If the appointed counsel declines to request an extension and instead files a perfunctory brief, the indigent appellant is denied the effective assistance of counsel on appeal, a right which he is guaranteed by the Sixth Amendment.

The Kentucky Court of Appeals denied this motion for an additional extension. It also dismissed the appeal. When counsel went back to the trial court and sought and received an order reinstating the appeal, the Supreme Court held a hearing and decided that the trial court had no authority to readjudicate a procedural issue already decided by the highest court of the state. It again dismissed the appeal.

While there is no doubt as to the validity of this last ruling, the net result of the entire procedure is that the record shows, without dispute, that appellee Cleaver was denied counsel to process his appeal, while other persons in Kentucky convicted of crimes who had the financial means to do so would have been able to perfect their appeals and receive adjudication of them by the highest court in the state.

The District Judge who issued this writ did so on the basis of his view that appellant had been denied the effective assistance of counsel, relying in part upon *Douglas* v. *California*, 372 U. S. 353 (1963), and *Anders* v. *California*, 386 U. S. 739 (1967), and distinguishing *Ross* v. *Moffitt*, 417 U. S. 600 (1974).

Petitioner Cleaver, of course, has no federal constitutional right to appeal his state court conviction. *McKane* v. *Durston*, 153 U. S. 684 (1894). He has, however, a state constitutional right of appeal (Kentucky Constitution

§ 110(2)(b)[1]). This right cannot be regarded as having been vindicated by the appointment of a public defender who is so overloaded with work as to be unable to service his appeal as of right. Deprivation of counsel on this ground cannot, of course, be established merely by the public defender's assertion. Here, however, the facts alleged by the public defender concerning overload have not been disputed either in the proceedings before the State's highest court or in the briefing and argument in this federal habeas proceeding.

We recognize that the Attorney General does claim that "there is no proof that the state withheld adequate funds or staff to process indigent appeals." The record in this case is, however, proof to the contrary of this assertion and the same may be said of the record currently before us in *Brown* v. *Smith*, ____ F. 2d ____ (6th Cir. 1980) (No. 79-3589), wherein a similar habeas writ has been granted on similar facts by another United States District Judge.

The Attorney General also asserts, "The proper procedure would have been to request the assignment of additional personnel to handle the increased caseload." We do not, however, think that proving where the budget-making processes or personnel assignment procedures of the Commonwealth of Kentucky broke down is an appropriate burden to place upon an indigent habeas petitioner or his counsel. The state-appointed counsel for this defendant has stated that he could not perform his responsibility to perfect appellant's appeal because of an excessive workload. This assertion, if untrue, could have been contested,

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[1] "Appeals from a judgment of the Circuit Court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as provided by its rules." Kentucky Constitution § 110(2)(b).

but was not. It stands undenied on this record. An affluent defendant who sought to retain an overburdened lawyer could and would have hired another. This petitioner was denied equal protection of the law by being denied the right to appeal which Kentucky granted to others by its Constitution.

On this record we must conclude (and do) that the reason the public defender was delinquent in observing the time limitations facing him in processing this appeal was an overload of other appellate work before the Supreme Court of Kentucky, and that this overload rendered observance of the time limitation in this case impossible.

We recognize Kentucky's right to decide, in the first instance, any disputed issue of fact concerning representations of work overload by counsel supplied by the State. If inaccurate claims are tendered, Kentucky can take measures to discipline any lawyer found to be untruthful in such representations, or willfully or negligently delinquent. We believe, however, that the facts upon which we rely in this case are undisputed. As a result of them petitioner has been deprived of the right to appeal his conviction solely because his indigency status made the overburdened public defender his only source of legal representation. In *Ross* v. *Moffitt*, 417 U. S. 600 (1974), the Supreme Court said:

> The cases encompassed a variety of circumstances but all had a common theme. * * *
>
> [They] stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons. *Ross* v. *Moffitt, supra* at 606-07.

In *Ross* v. *Moffitt, supra*, the opinion of the Court also observed that the entitlement to appellate counsel (where the state grants an absolute right to appeal) implicates

both the equal protection clause and the due process clause. *Id.* at 608-09.[2]

In the District Court in our present case, the District Judge relied primarily upon a due process analysis based on denial of counsel. In the event the largely equal protection rationale employed above is found inadequate to sustain this writ, alternatively we endorse the opinion authored by the District Judge and dated May 29, 1979.

The judgment of the District Court is affirmed.

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[2]The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Proces Clause of that Amendment. Neither Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors. "Due process" emphasizes fairness between the State and th individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. We will address these issues separately in the succeeding section. *Ross* v *Moffitt*, supra at 608-09. (footnote omitted).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 78-204

GEORGE H. CLEAVER - - - - - *Petitioner*

v.

DONALD E. BORDENKIRCHER, Warden, Kentucky State Penitentiary - - - - *Respondent*

ORDER (Entered May 31, 1980)

In conformity with the Memorandum Opinion filed herein this date,

IT IS ORDERED HEREIN AS FOLLOWS:

(1) That the petition for a writ of habeas corpus be, and the same hereby is, GRANTED.

(2) That this Order be, and the same hereby is, STAYED for a period of sixty (60) days from this date.

(3) That the Commonwealth of Kentucky shall, within sixty (60) days of the date of this Order, notify the Court as to whether petitioner's appeal has been reinstated.

(4) That, if at the end of sixty (60) days, no notice of reinstatement of petitioner's appeal has been filed, the writ sought herein shall issue without further order of the Court.

This the 29th day of May, 1979.

(s) H. David Hermansdorfer, Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 78-204

GEORGE H. CLEAVER - - - - - *Petitioner*

v.

DONALD E. BORDENKIRCHER, Warden, Kentucky State Penitentiary - - - - *Respondent*

MEMORANDUM OPINION—Filed May 30, 1979
(Entered May 30, 1980)

Petitioner herein was convicted on February 5, 1976 in the Johnson Circuit Court of robbery and murder and was sentenced to imprisonment for life. On direct appeal of right to the Kentucky Supreme Court petitioner was represented by the Kentucky Public Advocate who failed to timely file petitioner's appellate brief. After a final extension deadline passed, the appeal was dismissed. By order of October 25, 1977, the Johnson Circuit Court, apparently in response to the Public Advocate's motion alleging ineffective assistance of appellate counsel, reinstated petitioner's right to appeal. Petitioner refiled his appeal; but at oral argument the Supreme Court dismissed, without reaching the merits of the ineffective assistance claim, on the ground that the Circuit Court was without jurisdiction to reinstate petitioner's right to appeal. *Cleaver* v. *Commonwealth*, Ky., 569 S. W. 2d 166 (1978).[1] Still represented

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[1]Wherein the procedural history of petitioner's case in the Kentucky Courts is set forth fully.

by the Public Advocate, petitioner filed his application for a writ of habeas corpus in this Court on October 17, 1978, and by general order the matter was referred to the United States Magistrate at Ashland/Catlettsburg, Kentucky. The Court is now in receipt of the Magistrate's report, which recommends that the writ issue unless Kentucky retires petitioner or reinstates his appeal, and of the Commonwealth's scholarly particularized objections to that report. The matter is thus before this Court for *de novo* review.

The issues presented are (1) whether petitioner has a constitutionally protected right to effective assistance of counsel on direct mandatory appeal to the Kentucky Supreme Court, (2) what are the source and hence the parameters of that right if it exists, and (3) whether that right, if it exists, was violated by the failure of the Public Advocate to timely file petitioner's appellate brief which caused the dismissal of petitioner's appeal.

Petitioner argues that he has such a right and that this right was violated by the omissions of the Public Advocate and the dismissal of the appeal. In response the Commonwealth argues that petitioner has no constitutionally protected right to appeal, but only a state-created right subject to federal equal protection guarantees. Thus it is reasoned that petitioner's only right to effective assistance of counsel on appeal consists of a right to be free from irrational discrimination in the quality of the representation available based on his indigent status. Here, the Commonwealth points out, the dismissal of the appeal resulted not from discrimination against an indigent, but from the even-handed application of the appellate rule which sets a time limit for the filing of briefs. Indeed, petitioner does not allege that the Kentucky rules were applied in a discriminatory way to deprive him of an appeal because of his indigency; therefore it will be assumed that no Equal Protection violation has occurred and that unless peti-

tioner's asserted right to counsel on appeal has some basis other than the Equal Protection Clause of the Fourteenth Amendment, his petition must be denied.[2] To analyze the arguments the Court must look to three lines of cases—those defining the Sixth Amendment right to counsel in state trials, those setting the parameters of the rights of indigents on appeal, and those Sixth Circuit cases dealing with assistance of counsel on appeal.

The Sixth Amendment guarantees that a federal criminal defendant shall ". . . have the assistance of counsel for his defense." Assistance of counsel means *effective* assistance of counsel. *Avery* v. *Alabama*, 308 U. S. 444 (1940). The Sixth Amendment guarantee of effective assistance of counsel is a fundamental right and is therefore imposed upon the states by the Due Process Clause of the Fourteenth Amendment. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). To determine whether assistance of counsel at a criminal trial has met the requirements of the Sixth Amendment, the Sixth Circuit Court of Appeals applies a test which asks whether the representation supplied was ". . . reasonably likely to render and rendering reasonably effective assistance. . . . Defense counsel must perform at least as well as a lawyer with ordinary training and skill in criminal law and must conscientiously protect his client's interest . . . (citations omitted)." *Beasley* v. *United States*, 491 F. 2d 687, 696 (6th Cir. 1974). If, in

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[2]As to the possible significance, not addressed by the parties herein, of the fact that the attorney whose omission was the basis of the petition was paid by the Commonwealth rather than privately retained, *see*, *Cantrell* v. *Alabama*, 546 F. 2d 652 (5th Cir. 1977); *Fitzgerald* v. *Estelle*, 505 F. 2d 1334 (5th Cir.) (en banc), *cert. denied*, 422 U. S. 1011 (1975); *Goodwin* v. *Cardwell*, 432 F. 2d 521 (6th Cir. 1970) (O'Sullivan, J., dissenting); and *United States ex rel. Smith* v. *McMann*, 417 F. 2d 648 (2d Cir. 1969), *cert. denied*, 397 U. S. 925 (1970) (Friendly, J., dissenting).

the case at bar, counsel's failure to timely present an argument had occurred at trial and resulted in a conviction rather than a dismissal of appeal, there is little doubt that it would be deemed ineffective assistance under *Beasley* and require the issuance of the writ applied for. *Wilson* v. *Phend*, 417 F. 2d 1197 (7th Cir. 1969); *see also*, *Reece* v. *Georgia*, 350 U. S. 85 (1955).

The question that remains is how the fact that counsel's omission here occurred at the appeal stage affects petitioner's claim. The cases on indigents' post-conviction rights show that there is no federal constitutional right to appeal. *Ross* v. *Moffitt*, 417 U. S. 600 (1974); *Norris* v. *Wainwright*, 588 F. 2d 130, 137 (5th Cir. 1979). When a state grants a right to appeal criminal convictions, it may impose conditions upon the exercise of that right. *Ross*, *supra*, at 417; *McKane* v. *Durstan*, 153 U. S. 684 (1894). In *Douglas* v. *California*, 372 U. S. 353 (1963), it was held that where the state provides for an appeal of right, the Fourteenth Amendment prohibits it from conditioning the appointment of appellate counsel for indigents upon a preliminary determination by the Court of Appeals that the appeal is meritorious since to do so draws ". . . an unconstitutional line . . . between rich and poor." *Id.* at 357. Mr. Justice Douglas' opinion in *Douglas* was based predominantly on the Equal Protection Clause, but his statement that "[w]hen an indigent is forced to run this gauntlet of a preliminary showing of merit [without assistance of counsel] the right to appeal does not comport with fair procedure . . . ." *Id.* at 357, indicates that he thought the right to counsel on appeal also had a Due Process component.

In *Anders* v. *California*, 386 U. S. 738 (1967), appointed appellate counsel reviewed appellant's trial record and informed the appellate court that the appeal was without merit. Appellant moved for appointment of substitute

counsel, and his motion was denied. He then filed his *pro se* appellate brief. The Court, after examining the record, affirmed the conviction. The United States Supreme Court, citing *Gideon* v. *Wainwright, supra,* held that the practice of allowing appointed counsel to effectively withdraw from an appeal upon his own determination of lack of merit and then requiring appellant to proceed *pro se* was one in which "[t]he constitutional requirement of substantial equality and fair process . . ." had not been fulfilled. *Anders* v. *California, supra* at 744. As in *Douglas, supra,* it is unclear whether the Court meant that petitioner had a Due Process right to counsel on appeal regardless of his indigent status or that petitioner had an Equal Protection right to counsel since non-indigents were not subject to the Court's discretionary refusal to appoint substitute counsel once the attorney commencing the appeal pronounced it nonmeritorious.

In *Ross* v. *Moffitt, supra,* the Court held that neither the Due Process or the Equal Protection Clause imposes a duty on a state to provide counsel for indigent defendants who have exhausted their mandatory appeal right and are pursuing a discretionary appeal. Mr. Justice Rehnquist's analysis of the Due Process component in *Ross* can be interpreted by the Commonwealth in this case, as a repudiation of the language in *Douglas* and *Anders* which seems to find a Due Process as well as an Equal Protection basis for indigents' right to counsel on appeal. *Ross* v. *Moffitt, supra* at 609-11.

Given the lack of clarity in the Supreme Court cases as to the basis and therefore the extent of the right to effective assistance on appeal, the Court must look to certain Sixth Circuit decisions dealing with claims of ineffective assistance of counsel at the post-trial stages of

criminal proceedings.[3] In *Boyd* v. *Cowan*, 519 F. 2d 182 (6th Cir. 1975), it was held that the convicted state defendant's right to effective assistance of counsel on appeal was violated when his appointed trial counsel failed to tell him that he (the lawyer) would not file and process an appeal with the result that pretitioner's time for filing notice of appeal lapsed. In *Woodall* v. *Neil*, 444 F. 2d 92 (6th Cir. 1971), the Court held that where a habeas corpus petitioner alleged that, after his state trial, retained counsel had contrary to petitioner's instructions failed to perfect an appeal, allowing petitioner's time to run; petitioner had stated a cause of action for ineffective assistance of counsel. In *Goodwin* v. *Cardwell*, 423 F. 2d 521 (6th Cir. 1970), petitioner was held to have stated a claim of ineffective assistance of counsel where he alleged that retained trial counsel had failed to inform him of his right to appeal. In his strong dissent, Judge O'Sullivan apparently conceded that, had petitioner been represented by appointed counsel, he would have been entitled to a hearing on ineffective assistance. *Id.* at 523-24 (O'Sullivan, J., dissenting), In *Benoit* v. *Wingo*, 423 F. 2d 880 (6th Cir.), *cert. denied*, 400 U. S. 852 (1970), petitioner's appointed trial counsel commenced an appeal from his state conviction but then withdrew; the appeal was dismissed. Citing *Douglas* v. *California, supra*, the Court held simply that "[t]he indigent is entitled to have counsel to assist him on appeal [citations omitted]." *Benoit* v. *Wingo, supra* at 882. All of these cases seem to recognize a Due Process right to effective assistance of counsel on appeal, albeit none of them includes an explicit statement of the source of the right.

The Commonwealth argues that the above cases are not controlling because they found ineffective assistance of

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[3]These cases would themselves dispose of the questions presented here were it not for the fact that they were all decided before *Ross* v. *Moffitt, supra*. See further discussion *infra*.

trial, not appellate, counsel. The simple answer to this argument is that the errors complained of occurred *after* the trial stage and involved either failure to commence or failure to prosecute an appeal. To argue that these were not appellate errors borders on sophistry. The more substantive objection to these cases is that they were all decided before *Ross* v. *Moffitt, supra.* They were therefore decided without the benefit of the language in that case which the Commonwealth argues should be read to restrict the right of effective assistance of counsel on appeal to the ambit of Equal Protection.

A thorough review of the law having been made, it is clear that indigents have *at least* an Equal Opportunity right to effective assistance of counsel on mandatory appeal. But this does not help petitioner herein because no offensive discrimination between rich and poor is claimed. Unless the Court determines that he has a Due Process right to assistance of counsel meeting the standard of *Beasley* v. *United States, supra,* his petition must be denied. There is no doubt the law is unsettled after *Ross* v. *Moffitt, supra.* Given the context of the Due Process analysis in *Ross, i.e.,* the Court was concerned with a discretionary appeal taken after appellant had lost on his mandatory appeal even with ample assistance of counsel; given the fact that the *Ross* court could have overruled *Douglas* v. *California, supra,* and *Andrews* v. *California, supra,* but chose not to do so; and given the Sixth Circuit cases citing *Douglas* and *Anders* in finding ineffective assistance by both retained and appointed appellate counsel; it must be concluded that, as the law now stands, petitioner herein has a Due Process right to assistance of counsel on mandatory appeal which satisfies the standard of *Beasley* v. *United States, supra.*

The Public Advocate has conceded and the Commonwealth does not controvert that the Public Advocate's fail-

ure to timely file petitioner's appellate brief after three extensions is representation less effective than that expected of ". . . a lawyer with ordinary training and skill in criminal law. . . ." *Id.* at 697. As the Supreme Court stated in *Ross,* the case most heavily relied on by the Commonwealth, a state criminal defendant is entitled to have his ". . . claims of error . . . organized and presented in a lawyerlike fashion to the Court of Appeals. . . ." *Ross* v. *Moffitt, supra* at 615. Because of the Public Advocate's failure to adequately represent him, petitioner was deprived of such a presentation.

Mr. Justice Rehnquist said in *Ross* that professional legal assistance on appeal is a sword rather than a shield and implied that the state has no Due Process duty to thus arm a convicted defendant. It is the holding of this Court that if the state *does* hand the defendant the sword of post-conviction assistance of counsel, it must be of steel, not paper. The state need not guarantee that it will cut as will the best of swords; it must, however, insure that once the defendant puts his faith in the weapon provided him, it will not crumble against the first routine procedural

shield the state throws up.[4] This does not conflict with the holding or the analysis on *Ross*.

For the reasons set forth above, the writ prayed for herein shall be granted unless the Commonwealth reinstates petitioner's appeal within sixty (60) days. An order in conformity herewith shall issue this date.

This the 29 day of May, 1979.

(s) H. David Hermansdorfer, Judge

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[4]The state must, in other words, insure that appellants' legal weapons are welded by persons reasonably skilled in their use. In connection with this and pursuant to this Court's supervisory, rather than its review, powers, the Office of the Public Advocate of Kentucky is advised not to assign any matter to be filed or which is pending in this Court to any attorney whose own ineffectiveness or incompetency is among the grounds asserted for relief. Any attorney who has asserted his own incompetency to handle trial matters in any forum shall make that fact known directly to the Court so that an appropriate determination can be made as to the qualifications of such attorney to practice before it. The Public Advocate's Office shall advise the Court as to what disciplinary action or retraining has taken place with respect to such attorney. Every criminal defendant is entitled or right to be represented by ". . . a lawyer with ordinary training and skill in criminal law." *Beasley* v. *United States, supra* at 697. To continue the use of admittedly incompetent attorneys does not serve the reasonable ends of justice.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 79-3514

GEORGE H. CLEAVER - - - *Petitioner-Appellee*

v.

DONALD E. BORDENKIRCHER, Superintendent
Kentucky State Penitentiary - *Respondent-Appellant*

BEFORE: EDWARDS, Chief Circuit Judge, ENGEL and JONES, Circuit Judges

ORDER STAYING MANDATE

(Entered December 1, 1980)

ORDERED, That motion staying mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for seventy-five days from this date; provided that, if within such seventy-five days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied within such seventy-five days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

THE CONSTITUTION OF THE UNITED STATES

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

* * * * * * *

Amendment 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

* * * * * * *

Amendment 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment

of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * * * * * *

SUPREME COURT OF THE UNITED STATES
RULE 16.1

1. Within 30 days after receipt of the jurisdictional statement, unless the time is enlarged by the Court or a Justice thereof, or by the Clerk under the provisions of Rule 29.4, the appellee may file a motion to dismiss, or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss, provided that a motion to affirm or dismiss shall not be joined with any other pleading. The Clerk shall not accept any motion so joined.

(a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.

(b) The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

(c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause repends are so unsubstantial as not to need further argument.

(d) The Court will receive a motion to dismiss or affirm on any other ground the appellee wishes to present as a reason why the Court should not set the case for argument.

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RULE 33.7

7. The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply: the filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted. If the Court shall find that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel. See also Rule 38 respecting oral argument.

* * * * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

RULE 31(c)

(c) Consequence of Failure to File Briefs. If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file his brief, he will not be heard at oral argument except by permission of the court.

* * * * * * *